Prestasia Sdn Bhd v Mow Wai Lan

COURT OF APPEAL (KUALA LUMPUR) — APPEAL NO W-02-305-94
MAHADEV SHANKAR, ABU MANSOR JJCA AND ABDUL MALEK AHMAD J
11 OCTOBER AND 3 NOVEMBER 1995

Civil Procedure *— Res judicata — Disposal of action without deciding on counterclaim — Trial judge did not decide on the issue of counterclaim when disposing the action — Counterclaim was proceeded in a separate action — Whether issue of counterclaim was res judicata*

Civil Procedure *— Originating summons — Proper procedure where one party counterclaims — Whether necessary for a separate summons — Rules of the High Court 1980 O 28 rr 4(1), (2), 7(1), (2), (3) & 8*

The appellant ('the company') had secured the rights to operate a quarry on a piece of land ('the land'). The company entered into a quarry lease agreement ('the agreement') with the respondent ('Mow') which gave the latter an irrevocable power of attorney to conduct all mining operations on the land by way of lease for 30 years. Under the agreement, Mow was required to pay RM100,000 as deposit for her compliance with the terms of the agreement to be returned to her upon termination of the agreement. The agreement also provided that (i) Mow shall commence excavation works on the land within eight months from the execution of the agreement failing which the company is entitled to terminate the agreement; (ii) the rate of tribute shall be RM1.50 per ton of rocks, stones and other material produced and sold from the land; (iii) Mow shall pay the company a minimum of RM15,000 by way of tribute per month in the event that the rocks produced shall be less than 10,000 tons per month; and (iv) Mow was 'to make the rocks got hereunder into marketable products ...'.

On or about 9 October 1992, a licence was obtained from the Director of Forestry in the name of the company which authorized the company to extract from the land 'bahan batu batan (kuari batu granit)'. Mow's solicitors by letter dated 16 April 1993 informed the company that a geological survey revealed that the rocks from the land were not granite and concluded that the material on the land were not marketable in accordance with the terms of the agreement and therefore there was no true consideration for the agreement. The company's solicitors responded by a letter dated 20 May 1993 that since Mow had not commenced excavation works on the land within eight months from the date of execution, there was a breach and gave notice that 'our client hereby expressly terminate the agreement'. This was followed by a letter dated 13 August 1993 whereby the company's solicitor gave six months notice to terminate the agreement because Mow had failed to pay the tribute money due under the agreement and had failed to comply with the agreement. The company

A did not make the refund and Mow's solicitors filed an originating summons praying, inter alia, for a declaration that the deposit had to be returned to Mow when the agreement was terminated by any party. The company replied that the deposit was rightfully forfeited by reason of Mow's failure to commence excavations within eight months from the date of the agreement and claimed further that Mow had failed to pay the minimum tribute of RM15,000 per month for a period of nine months, ie RM135,000. The judge gave Mow the order in terms of the originating summons without touching on the issue of counterclaim. The company, to counterclaim for tribute, subsequently filed an originating summons which, inter alia, prayed for a declaration that Mow pay the company tribute in the sum of RM135,000.

Counsel for Mow raised an objection stating that to allow the company to make a counterclaim was an abuse of the process of court and that the application should be dismissed as all the issues had been raised in the previous hearing. Counsel for the company submitted that res judicata did not apply as there was no procedure for making a counterclaim in the earlier originating summons and that further, the earlier action was for the refund of deposit whereas the current action related to the claim for tribute. The judge dismissed the application with cost. The company appealed.

Held, allowing the appeal:

(1) The trial judge could have given directions under O 28 r 4(2) or r 7(3) of the Rules of the High Court 1980 ('the RHC') for the disposal of the counterclaim but he did not do so. Since the order was totally silent as to the counterclaim, it followed that the trial judge did not make any order under r 7(3) 'that the counterclaim be struck out' which was what he was obliged to do if both parties had argued the merits of the matter and the judge considered it to be without merit. In the result, the counterclaim was left unresolved (see p 249D–E).

(2) It was an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings. Res judicata would apply only where the points not litigated, properly belonged to the subject of the earlier proceedings. The question was: 'Was the same question decided in the earlier proceedings?' The court's view was that it was not. The trial judge left the company to proceed for the tribute in a separate action. The plea for res judicata was without merit (see p 250B–F); *Carl Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1966] 2 All ER 536 and *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24 followed.

(3) This tribute became payable from the date the agreement was entered into up to the date of termination on 20 May 1993. Since the minimum tribute was payable on the 10th of each

month, the total tribute was for nine months amounting to RM135,000. Consequently, with the powers contained in O 28 r 4(1) of the RHC, the court was of the view that the terms of the agreement and the admitted facts clearly established the liability of Mow for the tribute of RM135,000 claimed (see pp 250I and 251A, C–D).

Obiter:

Another way of looking at this case was to consider Mow's solicitors' letter of 16 April 1993 as an anticipatory repudiation of the agreement since she was saying that she proposed to carry out no work on the land and in fact did not carry out any excavation. The absence of granite, even if this had been properly proved (and it was not), was no excuse.

Had the agreement been terminated by the letter dated 20 May 1993 (and the court held that it was), the subsequent purported termination by the letter dated 13 August 1993 was misconceived. This, however, had not resulted in any prejudice since the amount of tribute claimed was the same (see p 251B–C).

[Bahasa Malaysia summary

Perayu ('syarikat tersebut') telah memperolehi hak untuk mengendalikan sebuah kuari atas sebidang tanah ('tanah tersebut'). Syarikat tersebut telah mengikat suatu perjanjian pajakan kuari ('perjanjian tersebut') dengan penentang ('Mow') yang memberikan Mow surat kuasa wakil yang tidak boleh ditarik balik untuk menjalankan semua operasi pelombongan atas tanah tersebut melalui pajakan selama 30 tahun. Di bawah perjanjian tersebut, Mow dikehendaki membayar RM100,000 sebagai deposit untuk pematuhan terma perjanjian tersebut untuk dikembalikan kepadanya atas penamatan perjanjian tersebut. Perjanjian tersebut juga memperuntukkan bahawa: (i) Mow harus memulakan kerja penggalian atas tanah tersebut dalam tempoh lapan bulan daripada pelaksanaan perjanjian tersebut dan kegagalan berbuat demikian bermakna syarikat tersebut berhak menamatkan perjanjian tersebut; (ii) kadar ufti adalah RM1.50 satu tan batu batan, batu dan bahan lain yang dihasilkan dan dijual dari tanah tersebut; (iii) Mow harus membayar kepada syarikat tersebut jumlah minima sebanyak RM15,000 melalui ufti sebulan sekiranya batu batan yang dihasilkan adalah kurang daripada 10,000 tan sebulan; dan (iv) Mow haruslah 'menjadikan batu batan yang didapati keluaran yang boleh dipasarkan ...'.

Pada atau sekitar 9 Oktober 1992, suatu lesen diperolehi daripada Pengarah Perhutanan dalam nama syarikat tersebut yang memberi kuasa kepada syarikat tersebut untuk mengeluarkan dari tanah tersebut 'bahan batu batan (kuari batu granit)'. Peguamcara Mow menerusi sepucuk surat bertarikh 16 April 1993 memberitahu syarikat tersebut bahawa suatu peninjauan geologi mendapati bahawa batu batan dari tanah tersebut bukanlah granit dan menyimpulkan bahawa material atas tanah tersebut tidak boleh dipasarkan menurut terma perjanjian

tersebut dan oleh itu tiada balasan sebenar untuk perjanjian tersebut. Peguamcara syarikat tersebut menjawab dengan surat bertarikh 20 Mei 1993 bahawa oleh kerana Mow tidak memulakan kerja penggalian atas tanah tersebut dalam tempoh lapan bulan dari tarikh pelaksanaan, terdapat kemungkiran dan memberikan notis bahawa 'klien kami menamatkan perjanjian tersebut'. Ini disusuli oleh sepucuk surat bertarikh 13 Ogos 1993 di mana peguamcara syarikat tersebut memberikan notis enam bulan untuk menamatkan perjanjian tersebut sebab Mow telah gagal membayar wang ufti yang harus dibayar di bawah perjanjian tersebut dan telah gagal mematuhi perjanjian tersebut. Syarikat tersebut tidak membuat pengembalian itu dan peguamcara Mow memfailkan suatu saman pemula yang memohon, antara lain, suatu perisytiharan bahawa deposit itu harus dikembalikan kepada Mow apabila perjanjian tersebut ditamatkan oleh mana-mana pihak. Syarikat tersebut menjawab bahawa deposit itu telah dilucut dengan betul atas sebab kegagalan Mow untuk memulakan penggalian dalam tempoh lapan bulan dari tarikh perjanjian tersebut dan menuntut selanjutnya bahawa Mow telah gagal membayar ufti minima sebanyak RM15,000 sebulan untuk jangkamasa sembilan bulan, iaitu RM135,000. Hakim memberikan Mow perintah seperti dikehendaki oleh saman pemula tanpa menyentuh isu tuntutan balas. Syarikat tersebut, bagi membuat tuntutan balas untuk ufti, kemudiannya memfailkan suatu saman pemula yang, antara lain, memohon perisytiharan bahawa Mow membayar ufti kepada syarikat tersebut dalam jumlah RM135,000.

Peguamcara Mow membangkitkan bantahan yang menyatakan bahawa untuk membenarkan syarikat tersebut membuat tuntutan balas sama seperti penyalahgunaan proses mahkamah dan bahawa permohonan itu patut ditolak oleh kerana semua isu telah ditimbulkan dalam pembicaraan yang lebih awal. Peguamcara syarikat tersebut berhujah bahawa res judicata tidak terpakai sebab tiada prosedur untuk membuat tuntutan balas dalam saman pemula yang lebih awal dan bahawa selanjutnya, tindakan yang lebih awal adalah untuk pengembalian deposit manakala tindakan ini adalah berhubung dengan tuntutan untuk ufti. Hakim telah menolak permohonan itu dengan kos. Syarikat tersebut membuat rayuan.

Diputuskan, membenarkan rayuan:

(1) Hakim perbicaraan boleh memberikan arahan di bawah A 28 k 4(2) atau k 7(3) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk penyelesaian tuntutan balas tetapi beliau tidak berbuat demikian. Oleh kerana perintah tidak langsung menyebut tentang tuntutan balas, ini bermakna bahawa hakim perbicaraan tidak membuat apa-apa perintah di bawah k 7(3) 'bahawa tuntutan balas dibatalkan' sebagaimana yang wajib dilakukan oleh beliau jika kedua-dua pihak telah menghujahkan merit perkara itu dan hakim mendapati ia adalah tanpa merit. Akibatnya, tuntutan balas dibiarkan tidak diselesaikan (lihat ms 249D–E).

(2) Adalah satu penyalahgunaan proses untuk membangkitkan dalam prosiding yang berikutnya perkara yang boleh dan sepatutnya telah dibicarakan dalam prosiding yang lebih awal. Res judicata hanya terpakai di mana perkara yang tidak dihujah sewajarnya tergolong dalam subjek prosiding yang lebih awal. Soalannya adalah: 'Adakah soalan yang sama telah diputuskan dalam prosiding yang lebih awal?' Pendapat mahkamah adalah bahawa ia tidak diputuskan. Hakim perbicaraan membiarkan syarikat tersebut meneruskan tindakan untuk ufti dalam tindakan yang berasingan. Hujah untuk res judicata adalah tanpa merit (lihat ms 250B–F); *Carl Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1966] 2 All ER 536 dan *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24 diikut.

(3) Ufti ini menjadi harus dibayar dari tarikh perjanjian tersebut diikat sehingga tarikh penamatan pada 20 Mei 1993. Oleh kerana ufti minima harus dibayar pada 10 haribulan setiap bulan, ufti keseluruhan adalah untuk sembilan bulan berjumlah sebanyak RM135,000. Ekoran itu, dengan kuasa yang termaktub dalam A 28 k 4(1) KMT, mahkamah berpandangan bahawa terma perjanjian tersebut dan fakta yang diterima jelas menonjolkan liabiliti Mow untuk ufti RM135,000 yang dituntut (lihat ms 250I dan 251A, C–D).

Obiter:

Satu lagi cara untuk melihat kes ini adalah dengan mempertimbangkan surat peguamcara Mow bertarikh 16 April 1993 sebagai suatu penolakan perjanjian tersebut yang boleh diduga oleh kerana dia mengatakan dia tidak ingin menjalankan apa-apa kerja ke atas tanah tersebut dan pada hakikatnya tidak menjalankan apa-apa penggalian. Ketiadaan granit, jikapun ini telah dibuktikan dengan betulnya (dan tidak dibuktikan di sini), bukanlah alasan yang boleh diterima.

Jika perjanjian tersebut telah ditamatkan oleh surat bertarikh 20 Mei 1993 (dan mahkamah mendapati ia memang ditamatkan), penamatan kononnya oleh surat bertarikh 13 Ogos 1993 tidak berasas. Namun demikian, ini tidak mengakibat dalam apa-apa prasangka oleh kerana amaun ufti yang dituntut adalah sama (lihat ms 251B–C).]

Notes

For cases on res judicata, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2892–2939.

For cases on originating summons, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2334–2351.

Cases referred to

Carl Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2) [1966] 2 All ER 536 (folld)

Henderson v Henderson (1843) 3 Hare 100 (refd)

A *Hoystead & Ors v Commissioner of Taxation* [1926] AC 155 (refd)
Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993 (refd)
Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor [1993] 2 MLJ 469 (refd)
Tong Lee Hwa & Anor v Lee Yoke San [1979] 1 MLJ 24 (folld)
B *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581 (refd)

Legislation referred to

Rules of the High Court 1980 O 28 rr 4(1), 4(2), 7(1), 7(2), 7(3), 8

C **Appeal from:** Originating Summons No D2–24–92–94 (High Court, Kuala Lumpur)

Edwin Lim Hock Lee (*LE Tan & Co*) for the appellant.
VK Natarajan (*Kumar Jaspal Quah & Aishah*) for the respondent.

D *3 November 1995*

Mahadev Shankar JCA: This is an appeal by Prestasia Sdn Bhd ('the company') against the dismissal of their claim for tribute from the respondent, Mow Wai Lan ('Mow') under a quarry lease agreement.

E In February 1992, the company had secured the rights to operate a quarry on a piece of land ('the land') within the Bukit Cerakah Forest Reserve, on the terms set out in a letter dated 21 February 1992 from the Forest Department of Selangor.

The exploitation of these rights became the subject matter of a F formal agreement between the parties dated 18 August 1992 ('the agreement'). Mow was represented by Shearn Delamore & Co ('Mow's previous solicitors') and the company was represented by Messrs LE Tan & Co ('the company's solicitors'). The agreement is a formal document running into some 11 pages. Quite simply, the objective of the agreement was for the company to make over all its mining rights to the land to Mow. G This objective was achieved in the agreement by providing that the company would give Mow an irrevocable power of attorney to conduct all the required operations on the land by way of a lease for 30 years. Upon the execution of the agreement, Mow was required by cl 9 of the agreement to pay 'RM100,000 as deposit for her compliance with the terms of the H agreement'. Such deposit was 'to be returned to her upon termination of the agreement free from interest'. Clause 3 of the agreement provided that the 30-year lease shall commence immediately upon the execution of the agreement, and that Mow shall commence excavation works on the land within eight months from the execution of the agreement failing which the company was entitled to terminate the agreement. Clause 6 of the agreement I provided the rate of tribute shall be RM1.50 per ton of rocks, stones, and other material produced and sold from the land with a provision that Mow shall pay to the company a minimum of RM15,000 by way of tribute per month in the event that the rocks produced shall be less than 10,000 tons

per month. Clause 13 of the agreement provided that it was expressly agreed that: A

(i) if a party hereto fail to perform the terms of the agreement, the party shall be entitled to specific performance; and

(ii) the company shall have the right to terminate the lease in the event of non-payment of tribute money or non-compliance by Mow with the terms and conditions of the agreement by giving Mow six months' notice in writing. B

By cl 4 of the agreement, the company demised to Mow all the quarries, strata, seams, and bits of rock and other minerals which may be obtained by quarrying and excavating from the surface and underground workings C within the land. For this purpose, by cl 5, the company granted to Mow the right to enter the land to search for and obtain by excavations and quarrying the demised rock, spar and other minerals and to carry away, make merchantable and dispose of the same for Mow's own use and benefit. Amongst other rights granted by the company to Mow was in D cl 5(5), ie 'to make the rocks got hereunder into marketable products and for that purpose to erect on the land and operate asphaltic concrete patching plants and other appliances and conveniences'. Nowhere in the agreement did the company represent or warrant the quality of the rocks or minerals to be found therein. The only place in the agreement where the word granite appears is in cl 11 (sub-para 3(iii)) which required Mow 'to E keep regular and proper records of the quantity of granite, rocks, stones and other minerals'. By cl 11(ii) of the agreement, Mow took upon herself the obligation to pay tribute on or before the 10th day of the next calendar month following upon the sales of the rocks and stones and the products in the month before, and by cl 11(ii) of the agreement, Mow contracted to F obtain all the necessary licences, permits, permissions and approvals from the relevant authorities in order to work the land.

On or about 9 October 1992, a licence was obtained from the Director of Forestry in the name of the company. This licence authorized the company to extract from the land 'bahan batu batan (kuari batu G granit)'. Mow had conducted a geological survey of the area. From a letter written by Mow's previous solicitors dated 16 April 1993, it appears that a further survey was conducted from which it was discovered that the rocks from the land were not granite. Therefore, it was concluded that the material on the land was not marketable in the terms of cl 5(5) of the agreement. Therefore, Mow's previous solicitors stated that there was no H true consideration for the agreement and required a meeting of the parties to discuss their rights and obligations on the matter. Apparently, Mow's previous solicitors wrote a further letter on 18 May 1993 to which the company's solicitors' response was that as Mow had not commenced excavation works on the land within eight months from the date of execution of the agreement, there was a breach since the eight-month period expired I on 18 April 1993. So the company's solicitors gave notice in this letter that 'our clients hereby expressly terminate the agreement'. What reply if any there was to this letter by Mow's solicitors is not before us. On 13 August

1993, the company's solicitors sent a further letter to Mow's previous solicitors in which they stated that they had been instructed by the company to terminate the agreement because Mow had failed to pay the tribute money due under the agreement and had failed to comply with the agreement. Therefore, pursuant to cl 13(b) of the agreement, the company's solicitors gave Mow six months' notice to terminate the agreement without prejudice to their other rights thereunder. They also requested the return of the original mining permit.

Shortly after this, it appears that Mow changed her solicitors and appointed Messrs Kumar Jaspal Quah & Aishah ('Mow's solicitors'), who replied on 3 September 1993 demanding the return of RM100,000 which they claimed was a refundable deposit under cl 9(a) of the agreement, which Mow's solicitors said had been terminated by the company by their letter of 13 August 1993. Pending refund, Mow's solicitors claimed a lien on the mining permit and relevant documents relating to the land.

The company did not make the refund and on 15 November 1993, Mow's solicitors filed Originating Summons No D4–24–219–1993. We would emphasize that the first originating summons only contained the following prayers:

(i) a declaration that the deposit had to be returned to Mow when the agreement was terminated by any party;

(ii) that the deposit of RM100,000 was held by the company as a trustee on behalf of Mow until it was returned;

(iii) that the company pay back Mow the said money;

(iv) costs; and

(v) such other relief as the court may think just.

This application was supported by an affidavit of Mow. In it, she put her own interpretation upon the agreement and contended that the deposit of RM100,000 should be returned to her in any event since the company had terminated it on 13 August 1993. She said tribute only had to be paid if rocks had been extracted from the land and sold, which she could not do because the company had only provided a licence on 9 October 1992. She avoided any mention of the irrevocable power of attorney and her obligation under cl 11(ii) of the agreement to obtain whatever licences she required. Without disclosing when the previous geological survey was done, she said that a further geological survey showed that the rock material in the land was not granite but sandstone. Only one page of the survey was attached to her affidavit as an exhibit and this is not dated. Furthermore, the material portion of this report reads:

> Name of the rock:
>
> The presence grains of sand size suggest it to be a sandstone but from the high content of quartz and evidence of metamorphism observed it is more appropriate to call the rock quartzite. (See appeal record at p 228.)

She further said that because of this survey, she was unable to carry out any operations on the land; that because the rock material obtained from

the quarry was not strong or marketable, the company had breached the agreement! She then referred to the purported termination of the agreement by the letter dated 20 May 1993 and the further termination by the letter dated 13 August 1993 claiming tribute. She alleged that no tribute was payable because work had not commenced and there was no production, and prayed for an order in terms.

Mr Yap Pow Yoke, a director of the company, filed an affidavit in reply dated 25 February 1994. He referred to the irrevocable power of attorney given to Mow at the time of the execution of the agreement and joined issue with the allegations made by Mow in her affidavit. He said a proper reading of cl 9(a) of the agreement implied that the deposit would be forfeited if Mow failed to fulfill the terms of the agreement. Her breach was a failure to commence excavations within eight months from the date of the agreement. As to the licence and the alleged absence of granite, he specifically referred to cl 5 of the agreement whereby Mow was given complete latitude to carry out all the quarrying activities on the land and stressed that nowhere in the agreement had the company warranted or represented what was to be found in the land, and that by cl 11(ii) of the agreement, it was the obligation of Mow to obtain whatever licences she found necessary. So Mr Yap contended that whether or not the land contain granite was no concern of the company. He claimed the deposit was rightfully forfeited because of Mow's breach. Then Mr Yap referred to cl 6 of the agreement and claimed that the defendant had failed to pay the minimum tribute of RM15,000 per month for a period of nine months, ie RM135,000. This period of nine months was calculated from 18 April 1993, being the date on which the eight-month period expired added to the period of six months' notice given on 13 August 1993. He then prayed that Mow's application be dismissed with costs. The two main issues were:

(i) whether the deposit was refundable regardless of any alleged breach; and

(ii) whether the company was entitled to claim tribute in the sum of RM135,000.

The matter came before Zakaria Yatim J (as he then was) on 28 February 1994. Mr Jaspal Singh appeared for Mow and Mr KK Ong for the company. The matter was heard in chambers.

For reasons which we will explain later, we called for the notes of evidence of the hearing before Zakaria Yatim J. This shows that Mr Jaspal Singh merely referred to the agreement, to the plaintiff's omission to commence works within eight months and the consequent termination of the agreement by the company. As to the deposit, he referred to cl 9 and emphasized that it did not contain a forfeiture clause but merely stated that it was a deposit for compliance with the terms of the agreement 'and to be returned to (Mow) upon the termination of this agreement free from interest'. He did not say a word about tribute in his opening submission.

Mr Ong submitted that the plaintiff did not comply with cl 3 and that there was an implied right of forfeiture due to non-compliance. He then

A referred specifically to O 28 r 7 of the Rules of the High Court ('the RHC'), touched on the nature of a counterclaim, pointed out that a counterclaim require a separate summons and said there were two alternatives open to the court:

(i) for the originating summons to be dismissed with liberty; and

B (ii) for the court to exercise its discretion under O 28 r 8.

Then Mr Ong referred to cl 6 of the agreement (which required Mow to pay a minimum tribute) and said the plaintiff did not produce any rocks at all, did no excavation work and after the agreement did nothing. He said that as there was a genuine counterclaim and that the agreement was badly C drafted, its intention could be obtained by examining witnesses at a trial. He referred to the contra proferentum rule.

In his reply, *Mr Jaspal Singh specifically said that the company should proceed by writ.* His answer to Mr Ong's submission was that there was no dispute of facts but only a matter for construction of the agreement. He D too referred to the contra proferentum rule and said that the agreement was drafted by Mow's previous solicitors. The defendant was also represented by a firm of solicitors. He referred to cl 9 of the agreement.

This is all the material which Zakaria Yatim J had before him when he came to a decision then and there and made an order in chambers in E terms of the originating summons.

What is immediately apparent from this trend of events is that Zakaria Yatim J took the view that upon a proper construction of cl 9 of the agreement, the RM100,000 had to be returned upon the termination of the agreement since there was no specific reference either in cl 9 or in F any other part of the agreement for the forfeiture of this money, and any alleged breaches were irrelevant to this issue. The other issue raised was whether tribute had to be paid irrespective of the nature and quality of the minerals and rocks on the ground. Mow was saying that because there was no granite, there had been a total failure of consideration. The entire material before the judge shows that the only issue which he decided was G that the deposit should be returned to Mow in any event. The judge said nothing about the counterclaim.

Against this judgment, the company did not appeal. Instead, on 22 April 1994, it filed a summons in chambers for a stay of execution pending the outcome of the hearing of its counterclaim which it had filed H the same day against Mow by way of Originating Summons D2–24–92–94. In para 3 of the affidavit in support of the application for stay, Mr Ng Yee, a director of the plaintiff, stated that since the company had no means of filing a formal counterclaim in Mow's originating summons, its only recourse was to pursue its counterclaim in a fresh originating summons which it had now done and that as the claim and counterclaim both arose I under the same agreement, it was only fair that Mow's judgment should be stayed. This summons was fixed for hearing on 20 May 1994. On 13 May 1994, Mow affirmed an affidavit in which she claimed that Mr Ng's affidavit did not disclose any basis for staying execution and that

consequently the application should be refused. On 20 May 1994, Zakaria Yatim J dismissed the application for stay. A

The company was thus left with their Originating Summons D2–24–92–94 which they had filed on 22 April 1994. In this, the company prayed for:

(i) the declaration that tribute of RM135,000 had to be paid by Mow to the company up to 12 February 1994 being the date of the termination of the agreement; B

(ii) that Mow to pay the company tribute in the sum of RM135,000;

(iii) costs; and

(iv) further relief. C

It is to be noted that in form, this summons follows very closely the summons which Mow had filed earlier. Mr Ng Yee swore an affidavit in support in which he referred to the agreement, the 30-year lease therein and to the various other clauses in the agreement which obliged Mow to pay tribute under the agreement which was formally terminated. Mow swore an affidavit on 20 July 1994 in opposition. In it, she stated that in order to conduct operations in the quarry, she had to have a proper licence but that on 9 October 1992, the company's solicitors had given her a copy of a licence which only entitled her to extract granite. She had a geological survey done which showed that the rocks in the quarry were not granite but sandstone and therefore the licence was of no use to her. Mow then continued in her affidavit that because of this she could not conduct any further operations in the quarry and referred to the letter of her solicitors dated 16 April 1993. She claimed in the affidavit that within the time frame of eight months from the date of the signing of the agreement, she had taken all proper steps but the company had defaulted in performing its part of the agreement. Reference was made to the letter of 20 May 1993 and it was contended that Mow could not fulfill her obligations and had not defaulted in carrying out the agreement. As for the provision with regard to the payment of minimum tribute, Mow's defence was that the clause only referred to tribute payable on rocks produced and sold but stated that since it had not produced and sold any rocks whatsoever no tribute was payable. D E F G

By way of an afterthought and contrary to O 32 r 13(2)(b) of the RHC, Mow affirmed a further affidavit on 29 September 1994. In this affidavit, she referred to the previous proceeding under Originating Summons No D4–24–219–93 which was attached the affidavits of herself and Yap Pow Yoke and the order made by Zakaria Yatim J on 28 February 1994. She then referred to the application made by the company for a stay of execution and the affidavits filed in that context and the dismissal of that application. Then she contended that she had been advised and verily believed that the action presently brought under Originating Summons No D2–24–92–94 was similar to the earlier summons and that the issue raised by Mr Ng Yee in the present application was the same issue as had been raised by Mr Yap Pow Yoke in his earlier affidavit. It was then H I

A contended that although the company had raised the issue of tribute in Mr Yap Pow Yoke's affidavit, the company had failed to make a counterclaim in the previous proceedings. Therefore, it was contended that it was unfair to raise the same issue again and that the company was estopped from so doing.

B The matter now came before Rahmah Hussain J on 14 October 1994. Mr Edwin Lim appeared for the company. In summary, his contention was that the tribute should be paid because it was common ground that Mow had done no work whatsoever and the terms of the agreement imposed an obligation to pay minimum tribute in any event.

C Mr Jaspal Singh had appeared for Mow in the earlier proceedings before Zakaria Yatim J (according to the notes of evidence, Mr Jaswant Singh appeared for Mow. At the time of delivering the judgment, counsel for both parties said this was a mistake, and 'Jaswant' should read 'Jaspal'). After Mr Lim completed his submission on the merits, Mr Jaspal Singh claimed that to allow the company to make a counterclaim was an abuse D of the court's process. He said the counterclaim should have been raised before Zakaria Yatim J and that the application should be dismissed without going into the merits because all the issues should have been raised at the last hearing. He claimed there should be an end to litigation and called upon the court to dispose the matter on his preliminary objection. Mr Lim responded that res judicata did not apply because there was no E procedure for making a counterclaim in the earlier originating summons and pointed out that the cause of action which Zakaria Yatim J had decided was the plaintiff's claim for the refund of the deposit, whereas the cause of action which the company now sought to enforce was the claim for tribute. Mr Jaspal Singh then submitted that O 28 r 7 had been raised F in the previous suit, but Mr Lim replied that Zakaria Yatim J had not made any order with regard to the claim for tribute. Jaspal Singh's response to this was that the company should have appealed against Zakaria Yatim J's decision and should not ask the court to make decisions on the same issues.

G This submission found favour with the court and the summons was dismissed with costs.

Before Zakaria Yatim J, Mr Ong appeared for the company. Before us, it was Mr Edwin Lim of counsel for the company and Mr VK Natarajan for Mow. Although Mow had different lawyers from the same firm of solicitors representing her at each stage, it does not appear to have occurred H to Mr Jaspal Singh when he appeared before Rahmah Hussain J or Mr Natarajan when he appeared before us to disclose that when the matter of O 28 rr 7 and 8 had been presented to Zakaria Yatim J by Mr Ong, Mr Jaspal Singh in his reply specifically took the position that the company's counterclaim for tribute was properly the subject matter of a writ but that I the court should make the order for the refund of the deposit simply and purely on the basis of a construction of the agreement.

Mr Natarajan now strenuously submitted that what Mr Yap had raised in his affidavit was a set-off and that it had to be inferred from

Zakaria Yatim J's order that there was no merit in the claim for tribute since the whole of the deposit of RM100,000 was ordered to be refunded to Mow. He further submitted that even if Zakaria Yatim J had not purported to decide the claim for tribute, it was obligatory for the company to force its claim for tribute in those proceedings. Mr Natarajan did not elaborate how this could be done, but since the judge had not implemented O 28 rr 7 and 8 of the RHC, he submitted that the only recourse for the company was to appeal against his order. Not having done so, they were now precluded from filing a fresh claim.

In his submission to Zakaria Yatim J, Mr Ong specifically referred to O 28 r 7 of the RHC which reads:

> 7 (1) A defendant to an action begun by originating summons who has entered an appearance to the summons and who alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of any matter (whenever and however arising) may make a counterclaim in the action in respect of that matter instead of bringing a separate action.
>
> (2) A defendant who wishes to make a counterclaim under this rule must at the first or any resumed hearing of the originating summons by the Court, but, in any case, at as early a stage in the proceedings as is practicable, inform the Court of the nature of his claim and, without prejudice to the powers of the Court under para (3), the claim shall be made in such manner as the Court may direct under rule 4 or 8.
>
> (3) If it appears on the application of a plaintiff against whom a counterclaim is made under this rule that the subject-matter of the counterclaim ought for any reason to be disposed of by a separate action, *the Court may order the counterclaim to be struck out* or may order it to be tried separately or make such other order as may be expedient. (Emphasis added.)

He then referred specifically to the company's counterclaim in para 7 of Mr Yap's affidavit and posed two alternatives to the court:

(i) to dismiss the originating summons; and

(ii) to exercise its discretion under r 8.

Now O 28 r 4 reads:

> 4 (1) The Court by whom any originating summons is heard may, if the liability of the defendant to the plaintiff in respect of any claim made by the plaintiff is established, make such order in favour of the plaintiff as the nature of the case may require, but where the Court makes an order under this paragraph against a defendant who does not appear at the hearing the order may be varied or revoked by a subsequent order of the Court on such terms as it thinks just.
>
> (2) Unless on the first hearing of an originating summons the Court disposes of the summons altogether or orders the cause or matter begun by it to be transferred to a Sessions Court or makes an order under rule 8, the Court shall give such directions as to the further conduct of the proceedings as it thinks best adapted to secure the just, expeditious and economical disposal thereof.

A It is not necessary to reproduce O 28 r 8 in full. Suffice to say that under it the court was empowered to order the proceedings to continue as if it had been begun by writ if it thought that was what should have been done, and to give consequential directions for the onward carriage of the matter.

These rules are identical to the corresponding English rules. The B commentary to 1 *Supreme Court Practice 1988* para 28/7/1 at p 470 reads:

> 28/7/1 *General.* This rule lays down no procedure for these cases. It is suggested that the defendant should serve on the plaintiff (and in the Ch D lodge in chambers) proposed points of counterclaim before the hearing of his application. The court can then give such directions as may be appropriate. Probably there would have to be C an order under r 8, but in some cases, the matter could be dealt with on affidavits.

It is to be noted that under O 28 r 4(1), the court may, if the liability of the defendant is established, make such order in favour of the plaintiff as the case may require.

D In the face of Mr Jaspal Singh's rejoinder that the claim for tribute should be proceeded with by way of writ, the judge made an order in terms. He could have given directions under r 4(2) or r 7(3) for the disposal of the counterclaim but he did not do so. Since the order is totally silent as to the counterclaim, it follows that Zakaria Yatim J did not make E any order under r 7(3) 'that the counterclaim be struck out' which is what he was obliged to do if both parties had argued the merits of the matter and the judge considered it to be without merit. In the result, the counterclaim was left unresolved.

As to res judicata, Mr Edwin Lim referred us to *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24 which applied the judgment of the F Privy Council in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993; [1964] MLJ 49. Chang Min Tat FJ held that since it had not been shown that the earlier judgment necessarily and with precision determined the point in issue, the plea of res judicata must fail.

Had Zakaria Yatim J necessarily and with precision determined the G counterclaim, he would have had to make an order dismissing it. That he certainly did not do so, and his omission was undoubtedly influenced by Mr Jaspal Singh's submission that it should be the subject of a separate writ.

Mr Natarajan submitted that the question of res judicata went beyond H matters decided to issues which could and should have been raised in the previous proceedings. He referred to *Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor* [1993] 2 MLJ 469 and especially the passage at pp 472D–473C. That case related to a contract for the sale of land. The buyer had paid the deposit, but before completion, the vendor forfeited. The buyer sued for specific performance by way of a writ action and I succeeded. The vendor's appeal was dismissed. The buyer then paid the balance of the purchase price and obtained good title. Thereafter, the vendor filed a summons in chambers *in the original action* for an order that in addition to the balance of the purchase price, the buyer should be made

to pay liquidated damages for late payment of the balance of the purchase price. A similar application to include such a prayer as an additional ground of appeal to the Supreme Court had already been dismissed. It is in that context that PS Gill J applied the dicta of Lord Kilbrandon in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581. Lord Kilbrandon also referred to *Henderson v Henderson* (1843) 3 Hare 100 at p 115. Carefully read, it will be observed that the real doctrine at work here is that it is an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings. Res judicata would apply only where the points not litigated, properly belonged to the subject of the earlier litigation. This explains the decision in *Hoystead & Ors v Commissioner of Taxation* [1926] AC 155 which was also cited to us because the admission that the beneficiaries were joint owners was so fundamental to the earlier decision that the commissioner was held estopped from litigating it afresh.

As stated in *Carl Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1966] 2 All ER 536 (referred to in PS Gill J's judgment at p 473), the first question is: 'Was the same question decided in the earlier proceedings?'.

In our view, decidedly not! Zakaria Yatim J left the company to proceed for the tribute in a separate action. The stand taken by Mr Jaspal Singh before Rahmah Hussain J and indeed by Mr Natarajan before us may be mitigated by supposing that the latter did not know and the former had forgotten what had happened before Zakaria Yatim J. Regrettably, his notes of evidence did not form part of the appeal record before us, and in the interests of justice, we felt obliged to call for it. In the light of what we now know, we think it was impermissible for them to advance a submission which was a total departure from the basis on which Mr Jaspal Singh obtained his order. The plea for res judicata was without merit.

Having relied only on a plea of res judicata and nothing else in the court below and before us, we feel obliged to follow the line taken by the court in *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24 and ask ourselves why we should not give judgment for the appellant forthwith. The terms of the agreement were common ground. Clauses 6 and 7 read:

> 6 The rate of tribute shall be a sum of one ringgit fifty sen (RM1.50) per tonne of rock stones and other products so produced and sold from the said lands (quarry dust and waste exempted).
>
> Provided that the second party shall pay to the first party a minimum sum of ringgit fifteen thousand (RM15,000) only as tribute per month in the event that the rocks produced by the second party shall be less than ten thousand (10,000) tonnes per month.
>
> 7 The payment of tribute shall be made on a monthly basis and provided always that payment shall be made on or before the 10th day of the next calendar month following upon the sale of the rocks and stones and products in the months before subject always to the terms and conditions of this agreement.

In our view, this tribute became payable from the date the agreement was entered into up to the date of its termination on 20 May 1993. Since the

minimum tribute was payable on the 10th of each month, the total tribute was for nine months amounting to RM135,000.

Another way of looking at this is to consider Mow's solicitors letter of 16 April 1993 as an anticipatory repudiation of the agreement since she was saying that she proposed to carry out no work on the land and in fact did not carry out any excavations thereon. In our view, the absence of granite, even if this had been properly proved (and it was not), was no excuse.

Had the agreement been terminated by the letter dated 20 May (and we hold it was), the subsequent purported termination by the letter dated 13 August 1993 was misconceived. This, however, has not resulted in any prejudice since the amount of tribute claimed is the same.

Consequently, and in line with the powers contained in O 28 r 4(1), we are of the view that the terms of the agreement and the admitted facts clearly establish the liability of Mow for the tribute of RM135,000 claimed.

This appeal is allowed. We order the respondent to pay the appellant RM135,000. We also order the respondent to pay the appellant his taxed costs both here and in the court below. The deposit will be refunded to the appellant.

11 October 1995

Abu Mansor JCA: I have had the opportunity of reading the draft judgment of my brother, Mahadev Shankar JCA in this matter with which I concur.

Appeal allowed.

Reported by Eugene Lee Hong Whye